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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 379.

PHILIP SHARE, IRVIN GORDON and JAMES TAMER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY BRIEF.

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ARGUMENT.

1. The Government misconceives, and only responds to a minor premise of, this contention (Br. Op. 9-10). On November 29, 1957, the defendants were arrested and charged with having conducted a wagering business without first registering and purchasing a stamp, in violation of the Occupational Tax Laws. Thereafter, they were further charged with having wilfully failed, after their arrest and while the Occupational Tax charges were pend-

ing, to file excise tax returns and to pay the excise tax on the very business operations concerning which they were already charged. Obviously, had they filed the excise tax returns and paid the excise taxes, they would have incriminated themselves on pending charges. Moreover, the Government had seized and possessed their records, making it impossible to file the returns.

It is our contention that the Government, having chosen to make the arrest and charges before the excise taxes were due, is precluded from bringing **criminal** charges predicated upon subsequent inaction, where affirmative action would have incriminated the defendants on pending charges.

The proof of their failure to make the returns and pay the tax after arrest was clearly prejudicial as to all counts of the indictment, including the count for September. The vast majority of the alleged wagers upon which the tax was not paid were taken during the months of October and November (upon which wagers the tax was not due until after the defendants' arrests), the business having only started in mid-September. In addition, the Court instructed the jury that it could consider a defendant's guilt on any one count in determining his intent with respect to any other count (D. A. 1490), thus the proof as to October and November was considered by the jury in deciding the September count.

2. As to whether the Court "conducted a searching and full examination of the veniremen" (Br. Op. 10-12) concerning the newspaper publicity (D. A. 115-211), depends upon what one considers necessary for a fair trial. If, as the Government states, all that is important is "the attitude of the jurors" (Br. Op. 12, note 6), it is true that the Court exacted a promise from each venireman that he would not consider the newspaper information (D. A. 116, 118, 121, 123, 124, 126, 128, 130, 136, 149, 152, 153, 155,

157, 161, 163, 167, 169, 178).[1] We read **Marshall** to mean more than that. For such a promise does not insure a fair trial. Nor do we fear that jury trials cannot be maintained if this Court requires standards by which an accused may be safely tried. Indeed, we believe, such requirement will stop most prejudicial publicity.

3. The Government's argument (Br. Op. 14) shows on its face that the Court did not require in its instructions that the jury find that mere employees (permitted to be convicted as aiders and abettors) knew that the principals were not paying the tax, contrary to **Ingram**. The Government notes that the "trial judge specifically instructed the jury that if any defendant was not a partner and was 'merely an employee of the alleged partnership * * * you must acquit such defendant of all Five (5) Counts of the Indictment; providing such employee was not an aider or abettor as defined in Instruction No. 41' (Instruction No. 36, A. 1543-1544). He also instructed that any defendant who did not have knowledge of the wagering tax law requirements should be acquitted (A. 1545-1546)." But the Court did not instruct that mere employees must know that their employers were not paying the tax.

4. If books of account and bank records are instrumentalities of tax evasion, as the Government contends (Br. Op. 16), the Fourth Amendment has been whittled away to naught and such decisions as **Harris v. United States**, 331 U. S. 145, no longer have any vitality. For all such books and records are now "closely related" to the subject of taxation.

5. We do not regard our contention that the defendants were improperly sentenced under Count V as "frivolous"

[1] But the knowledge of the jurors was not elicited, and indeed avoided (D. A. 127, 131).

(Br. Op. 16). The Government notes that Section 7203 contains the word "willfully" while Section 7272 does not, but it ignores the fact that Section 7203 makes no reference to failure to register, while Section 7272 specifically applies to failure to register, the conduct with which the defendants were charged. Apparently Congress chose to penalize all failures to register before beginning business alike, thus not burdening the Government with proof of knowledge of the requirement. Certainly the Government cannot write the offense into Section 7203, which deals only with taxes and returns.

For the reasons stated in the petition and herein, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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